No. 2644.

United States
Circuit Court of Appeals
For the Ninth Circuit

MANEY BROTHERS & CO. (a Co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), *Appellants*,

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROTHERS CONSTRUCTION COMPANY, Limited, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD and R. C. McKINNEY, *Appellees.*

CRANE CREEK IRRIGATION DISTRICT and SUNNYSIDE IRRIGATION DISTRICT, *Cross-Appellants*,

vs.

MANEY BROTHERS & CO. (a Co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), *Cross-Appellees.*

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BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

RICHARDS & HAGA, and
McKEEN F. MORROW,
Solicitors for Appellants.
Residence: Boise, Idaho.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

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BRIEF OF APPELLANTS

STATEMENT OF THE CASE.

This is an appeal from a decree foreclosing a mortgage of Maney Brothers & Co., and a mechanic's lien of the Portland Wood Pipe Company on an irri-

gation system commonly known as the Crane Creek Project, situated near Weiser, Washington County, Idaho. The facts, so far as material to this appeal, are substantially as follows:

The appellee, Crane Creek Irrigation Land & Power Company (hereinafter called the "Crane Creek Company") and its President and promoter of the enterprise, Mr. E. D. Ford, sometime prior to August 22, 1910, and shortly thereafter acquired a number of water rights and the necessary lands for rights of way for the reservoir and irrigation system described in the pleadings and record and involved in this appeal. The irrigation project was so situated that it would irrigate lands in what is known as the Sunnyside Irrigation District and in the Crane Creek Irrigation District, appellees and cross-complainants, as well as a considerable body of land situated outside the boundaries of either District.

On August 22, 1910, the Crane Creek Company entered into separate contracts with the two Irrigation Districts, the contracts being similar in form and terms except as to the percentage or interest in the irrigation system to be conveyed to the District upon the completion of the project. The contract with the Sunnyside Irrigation District is set out in full in the record (trans., pp. 101-121) and provides for the conveyance to that District of an undivided 35.26% interest in the system (later increased to 47.2%). The contract with the Crane Creek Irrigation District was entered into on the same date and is identical in every respect, except that it provides

for the conveyance to that District of an undivided 21.75% interest in the system. (Later increased to 22.4%).

At the time these contracts were entered into the irrigation project had not been constructed, in fact no work had really been done on the system, but under the contracts referred to the works were to be completed by the first day of May, 1912 (trans., par. VI, p. 107); and the Crane Creek Company was to accept in payment of the interests to be conveyed to the Districts the bonds of the Districts, to be delivered in installments as the work progressed.

The first construction work on the project was done by appellants, Maney Brothers & Co., who on September 29, 1911, entered into a contract with the Crane Creek Company for the construction of the reservoir at a price of approximately $87,000.00. (trans., p. 90). The Crane Creek Company, being without funds to pay for the construction work at that time, the contract with Maney Brothers provided that a mortgage should be given upon the entire irrigation project, including the reservoir to be constructed by appellants under said contract, and upon all the water rights and rights of way for the reservoir and canals, and upon certain farm lands owned by the Crane Creek Company. The mortgage specifically covers the contracts between the Crane Creek Company and the Irrigation Districts, dated August 22, 1910, and all moneys to be paid or bonds to be delivered thereunder. And on the same date, viz., September 29, 1911, the

Crane Creek Company made, executed and delivered to Maney Brothers its mortgage covering the property above referred to (Trans., exhibit A, p. 29); and a few days thereafter, viz., on October 6, 1911, the mortgage was filed for record in the office of the County Recorder of Washington County. The Districts were promptly advised of the arrangement with Maney Brothers and the giving of the mortgage, and had actual notice of Maney Brothers relation to the system and the mortgage referred to, as well as record notice thereof (trans., p. 165).

The reservoir was completed by Maney Brothers pursuant to their contract, and no work has been done thereon by any one else. The reservoir is situated some distance from the balance of the irrigation system, the water being turned out of the reservoir into the main channel of Crane Creek and flows down the channel of Crane Creek for several miles before it reaches the head works of the canals which constitute the balance of the irrigation system (Trans., p. 165). No work on the project was done after Maney Brothers completed the reservoir until April, 1913, when a contract for the construction of the canals and laterals, flumes and other structures was entered into between the Crane Creek Company, and Slick Brothers Construction Company, Limited; and the project was completed under said contract and extensions thereof about July or August, 1914.

The appellee, Portland Wood Pipe Company, furnished material under the contract with Slick Broth-

ers Construction Company, and filed notice of lien and afterwards commenced a suit for the foreclosure of the lien, to which suit Maney Brothers & Company and numerous other parties were made defendants. Maney Brothers & Co. filed answer to the bill foreclosing the lien of the Portland Wood Pipe Company and by cross-bill sought the foreclosure of their own mortgage.

The record is undisputed that the Districts made no payment whatever for any interest in the irrigation system until April 13, 1913, when the Sunnyside Irrigation District delivered to the Crane Creek Company $151,000.00 par value of its bonds, and on the same date the Crane Creek District delivered to the Company $99,000.00 par value of its bonds. These bonds were delivered to the Crane Creek Company in payment for an interest in the reservoir constructed by Maney Brothers under their contract and covered by their mortgage, dated September 29, 1911 (trans., p. 160). From time to time after April, 1913, the Irrigation Districts delivered bonds to the Crane Creek Company pursuant to estimates of engineers as the construction work progressed, in payment for certain undivided interests in the reservoir, canals, and water rights described in Maney Brothers mortgage, and upon which that mortgage purported to be a first and prior lien. At various times after the giving of that mortgage the Crane Creek Company and the Districts modified and changed, without the consent of Maney Brothers, the contracts of August 22, 1910.

The first deed to each District was dated May 29, 1913. The deed to the Sunnyside District is set out in full in the record (trans., p. 168). The deeds to the Crane Creek District were identical, except as to the proportionate interest conveyed to that District. Thirteen deeds in all were given to each District. The last deed bears date of August 15, 1914. None of the deeds were recorded, except the first deed, and that was recorded on the 19th day of November, 1914 (trans., p. 167).

The lien and priority of Maney Brothers mortgage was never disputed or questioned by the Districts until this suit was commenced; but on the contrary certificates and resolutions were issued and passed by the District officers and the Board of Directors acknowledging the priority and validity of Maney Brothers mortgage as a lien upon the entire irrigation system. (See Maney Bros. exhibit 5, trans., p. 154, and Maney Bros. exhibit 6, trans., p. 157.)

Decree was entered on June 12, 1915, giving the Portland Wood Pipe Company a lien upon the entire irrigation system, subsequent to Maney Brothers mortgage as to the interest in the system not yet conveyed by the Crane Creek Company, but prior to the mortgage, as to that part of the system conveyed to the Irrigation Districts, and giving Maney Brothers & Co. a first lien under their mortgage on the interest in the system still retained by the Crane Creek Company, but no lien whatever upon the interest in the system conveyed by the Company to the Districts, and holding in effect that as the original

contracts between the Company and the Districts had been entered into prior to the giving of the mortgage the Districts were not affected by the mortgage and could ignore the interest of the mortgagee in making payments to the Crane Creek Company and in otherwise dealing with that Company relative to the project, and that they had the right to pay off mechanic's liens against their interests in the system in bonds or the proceeds of the bonds to be delivered to the Crane Creek Company. The Court further declined to give any effect whatever to the certificates or resolutions issued and passed by the Districts, to the effect that the validity of Maney Brothers mortgage upon the entire system was conceded and that the Districts had no defense thereto.

The Court further declined to allow Maney Brothers more than $1,000.00 as attorney's fees for the foreclosure of the mortgage, for the reason that the contest resulted mainly from the attempt of Maney Brothers to enforce their lien against the interests in the system conveyed to the Districts, upon which issue he held in favor of the Districts. At the time of the decree there was due Maney Brothers & Co., under their mortgage, $40,140.00, and the Portland Wood Pipe Company $11,244.30.

SPECIFICATION OF ERRORS.

The errors are specified in detail in the assignment of errors, pages 212 to 217 of the record. Stated generally, they are:

1. That the Court erred in not decreeing that Maney Brothers had a first and prior lien upon the interest of the Crane Creek and Sunnyside Irrigation Districts in the reservoir, rights of way, water rights and irrigation works conveyed to them by the Crane Creek Company under the deeds made from time to time, commencing on May 29, 1913, and ending August 25, 1914, all of which were made long after the execution and delivery of the mortgage from the Crane Creek Company to Maney Brothers covering the same property, and of which the Districts had full notice.

2. That the Court erred in holding that the Sunnyside Irrigation District took title to 47.2% interest in the irrigation system, reservoir, water rights and rights of way free of Maney Brothers mortgage lien, and that the Crane Creek District took title to an undivided 22.4% interest in the same system free of such mortgage lien.

3. That the Court erred in holding and deciding that the certificate and resolution executed, issued and passed by the officers and Board of Directors of the Irrigation Districts, conceding the validity and priority of the lien of Maney Brothers mortgage, were ineffectual and without force and effect.

4. That the Court erred in holding and deciding that the Irrigation Districts had the right to apply the bonds, or the proceeds of the bonds, which were to be given the Crane Creek Company in payment for their interests in the irrigation system, to the satisfaction of mechanics' liens and other claims

against the system without regard to Maney Brothers' mortgage, and that after paying such mechanics' liens and claims no balance remained of the purchase price that could be applied to the reduction of Maney Brothers' mortgage.

5. That the Court erred in decreeing that Maney Brothers were only entitled to attorneys' fees in the sum of $1,000.00 for the foreclosure of their mortgage, when the record shows that the reasonable attorney's fee in such cases would be from $2,500.00 to $3,000.00.

6. That the Court erred in not entering a decree giving Maney Brothers a first and prior lien upon all of said irrigation system, rights of way, water rights and irrigation structures.

For a more particular statement of the errors assigned and relied upon on appeal, reference is made to the Assignment of Errors contained in the record (trans., pp. 212-217).

POINTS AND AUTHORITIES.

Mechanics' liens are entirely statutory and they can have only such dignity and priority as the statute confers upon them.

2 Jones, Liens, Sec. 1184.

Courts of Equity are without power to displace vested mortgage liens in favor of liens of contractors, laborers or material men.

Allis-Chalmers Co. v. Central Trust Co., 111 C. C. A. 428, 190 Fed. 700, 705.

Kneeland v. American Loan Co., 136 U. S. 89, 97, 34 L. ed. 379.

Vested mortgage liens upon real estate, water rights or rights of way for irrigation works cannot under the Idaho statutes be displaced by liens of contractors, laborers, or material men, who perform labor or supply material for improvements on such property under contracts entered into subsequent to the recording of the mortgage, or after actual notice of the mortgage.

Idaho Rev. Codes, Sec. 5114.

Pacific States, etc., Co. v. Dubois, 11 Ida. 319, 83 Pac. 513.

A valid mortgage lien may be created on after-acquired property, and, when the mortgage so provides, the mortgage lien attaches instantly upon the vesting of title, legal or equitable, in the mortgagor.

Mitchell v. Winslow, Fed. Cas. No. 9673.

Galveston H. & H. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. ed. 199.

A vested mortgage lien cannot be displaced by acts of the mortgagor or by mechanics' liens arising under subsequent contracts for construction of improvements on the mortgaged property, except in the case of after-acquired property where the lien may have attached before the mortgagor acquires title to the property.

Bear Lake & River Water Works & Irr. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327.

Garland v. Irrigation Co., 9 Utah 350, 34 Pac. 368.

Creer v. Cache Valley Canal Co., 4 Ida. 280, 38 Pac. 653.

The vendor under an executory contract of sale holds the legal title as security for the performance of the vendee's obligation, and the title or interest so held by the vendor may be conveyed, mortgaged or devised.

Taylor v. McKinney, 20 Cal. 620.

Gessner v. Palmater, 89 Cal. 89, 24 Pac. 608.

39 Cyc. 1664.

3 Pomeroy Eq., Sec. 1261.

1 Pomeroy Eq., Secs. 368, 372.

39 Cyc. 1301.

Where the vendor under an executory contract of sale has mortgaged his interest in the property, no act of the vendor or vendee thereafter can prejudice the right of the mortgagee.

Lamm v. Armstrong, 95 Minn. 434, 104 N. W. 304; 111 Am. St. Rep. 479; 5 A. & E. Ann. Cas. 418.

Smith v. Jones (Utah), 60 Pac. 1104.

Bartlesville Oil Co. v. Hill, 30 Okla. 829, 122 Pac. 208.

Younkman v. Hillman, 53 Wash. 661, 102 Pac. 773.

Land is not made inalienable merely by contracting to sell it, and every purchaser of land under an

executory contract of sale pays at his peril if he pays the purchase money to the vendor after he has mortgaged or assigned his interest in the property.

Laughlin v. North Wisconsin Lbr. Co., 176 Fed. 772.

Same case affirmed on appeal, 193 Fed. 367.

Southern Building Assn. v. Page, 46 W. Va. 302, 33 S. E. 336.

Mutual Aid, etc., Co. v. Gashe, 56 Ohio 273, 46 N. E. 985.

Georgia St. Assn. v. Faison, 114 Ga. 655, 42 S. E. 760.

Ten Eick v. Simpson, 1 Sandf. Chanc. (N. Y.) 244.

Elliott v. Delaney, 217 Mo. 14, 116 S. W. 494.

Tait v. Reid (Ia.) 139 N. W. 1101.

Minaker v. Sunset, etc., Assn., Cal. App., 145 Pac. 542.

Fargo v. Wade (Ore.), 142 Pac. 830.

Wright v. Troutman, 81 Ill. 374.

Lowery v. Peterson, 75 Ala. 109.

Adams v. Cowherd, 30 Mo. 458.

Russell v. Kirkbride, 62 Tex. 455.

McClintic v. Wise's Administrators, 25 Gratt. 448.

The doctrine of relation cannot be invoked in favor of a vendee under an executory contract of sale so as to cut off the equities of the vendor's mortgagee.

1 Devlin on Real Estate, Sec. 264.
Butler & Baker, 3 Coke Rep. 25, 29b.
Jackson v. Davenport, 20 Johns. (N. Y.) 536.
Murphree v. Countiss, 58 Miss. 712.
Jackson v. Bard, 4 Johns. 230, 4 Am. Dec. 267.
Barnes v. Cox (Neb.), 79 N. W. 550.
Rogers v. Heads Iron Foundry (Neb.), 70 N. W. 527.
39 Cyc. 1557.
Tomlinson v. Blackburn, 37 N. C. 509.
O'Neil v. Wabash Ave. Church, Fed. Cas. No. 10531.

A representation of future intention, absolute in form, made for the purpose of influencing the conduct of the other party and acted upon by him, is sufficient to raise an estoppel.

2 Pomeroy Equity Jur., Sec. 877 note.
Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618.
Seymour v. Oelrichs, 156 Calif. 782, 106 Pac. 88.
Faxton v. Faxton, 28 Mich. 159.

A representation as to the future operates as an estoppel where it relates to an intended abandonment of an existing right and is made to influence others and has induced them to act.

Union, etc., Life Ins. Co. v. Mowry, 96 U. S. 544, 25 L. Ed. 674.

Banning v. Kreiter, 153 Cal. 33, 94 Pac. 246.

American Surety Co. v. Ballman, 52 C. C. A. 204, 115 Fed. 292.

There is not one rule of morals for municipal corporations and another for individuals, and the former may be estopped just as the latter may be.

Boise City v. Wilkinson, 16 Ida. 150, 178, 102 Pac. 148.

Portland v. Inman-Poulsen Lumber Co. (Ore.) 133 Pac. 829.

Board v. Denver, 30 Colo., 13, 69 Pac. 586.

Hubbell v. Hutchinson, 64 Kan. 645, 68 Pac. 52.

Indiana v. Milk, 11 Fed. 389.

ARGUMENT.

No question has been raised as to the validity of Maney Brothers' mortgage. It is conceded that it was properly authorized and executed by the mortgagor, Crane Creek Irrigation Land & Power Company, and that it was recorded in the proper County immediately after its execution, and that the appellees and cross-appellants, Crane Creek Irrigation District and Sunnyside Irrigation District, have had actual as well as constructive notice of the existence of the mortgage from the time it was executed.

Mr. E. R. Coulter, testifying on behalf of the Irrigation Districts (trans., pp. 100-101), stated that he was Secretary of one of the Districts and had

been since April, 1913, and that he was and had been attorney for both Districts since their inception, and was familiar with all their transactions from the very inception of the Districts to the present time. And on cross-examination he said (trans., pp. 159-160):

> "I have frequently talked, and I have had frequent conversations with Mr. E. G. Wells, of Maney Brothers & Co., relative to that mortgage and know that they hold a mortgage on this property belonging to the Crane Creek Irrigation Land & Power Company. In fact, the mortgage is a matter of record in Washington County."

Mr. E. D. Ford, also a witness for the Districts, testified on cross-examination (trans., pp. 165-166):

> "I discussed with the two Districts and their Board of Directors from time to time the financial arrangements that were made from time to time and the failure of those who contracted to buy the bonds to take them as they had agreed, and the difficulties that resulted from that. I kept the Districts fully advised of my progress and of the negotiations and contracts that I made for the construction of these works and for the sale of these bonds, and it was because of those negotiations and those contracts that I got extensions from time to time from the Districts for the completion of these works. I advised the Districts of the giving to Maney Brothers of that mortgage on the system about the time it was given."

In fact, there does not appear to be any dispute over the facts on any matter involved on this appeal. It is purely a question of law as to the right of the Irrigation Districts to totally and completely ignore Maney Brothers' mortgage and deal with the mortgagor, after the mortgage had been given, relative to the mortgaged property as if no mortgage existed, and to modify, extend, and change their contracts for the purchase of the mortgaged property and take conveyances from the mortgagor of the mortgaged property without regard to the existence of the mortgage or the rights of the mortgagee.

The trial court held that the Districts had the right to see that the purchase price "was applied to the discharge of the superior liens; those of contractors, laborers and of material men," all of whom entered into their contracts for furnishing such labor and material long after the mortgage had been given and placed of record, and with full notice and knowledge of the existence of such mortgage. The only right that the trial court recognized in the mortgagees appears to be summed up in the unprofitable assumption stated in the decision that (trans., p. 189):

> "If we assume that thereafter (after seeing that the purchase price was applied to the discharge of liens and claims of contractors and material men) it was their duty to withhold from the vendor and pay to mortgagees the balance, it need only be said that there is no showing that there was any balance."

It is difficult to conceive of a mortgage being so flimsy, unsubstantial and precarious as the trial court held this mortgage to be. At most, said the Court, the mortgagees would be entitled only to the balance after others had been paid. The amount to be paid material men and other contractors was fixed without consultation with or the consent of the mortgagees. The price for which the bonds were sold by the Crane Creek Company and the Districts was likewise fixed or determined without the knowledge or consent of the mortgagee. The only right recognized in the mortgagees was that it might possibly have some claim to the residue or balance remaining after contractors and material men had been paid what the mortgagor saw fit to pay them out of the proceeds of bonds sold at a price satisfactory to the mortgagor and the Districts. The mortgagees were apparently the only ones that had no voice in what should be done with the mortgaged property.

The law gives to mortgages and contract liens greater dignity and a higher standing than the trial court accorded to appellants' mortgage in this case. It is only in extraordinary cases that any court has been permitted to displace to the slightest degree the priority of mortgage liens. Courts of equity have invariably avoided taking any action in determining the equities between litigants that would tend to destroy the sacredness of contract obligations. There is but one exception that has been recognized by the courts as a ground for not giving ef-

fect to a mortgage according to its terms, and that is in the case of receiverships of railroads and a few other similar public service corporations, where the mortgage covers earnings and income; but the courts have, for reasons that seem amply justified in such cases, permitted the use of such earnings for the payment of bills incurred from four to six months before the receivership for labor and material necessary to keep the concern going. But even in such cases the Courts have been careful to recognize the vested rights of mortgagees.

The Supreme Court of the United States, in discussing the power of a court of equity to use the earnings or income of a railroad corporation for the payment of labor and material claims incurred immediately prior to the receivership, said in Kneeland vs. American Loan & Trust Co., 136 U. S. 89, 34 L. Ed. 379, 383:

> "No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

And the Circuit Court of Appeals of the First Circuit, 190 Fed. 700, 705, in discussing the relative priorities of mortgages and mechanics' liens where bonds had been delivered before but not certified until after the contract of the lien claimants was entered into, said:

> "Whoever takes construction work upon property subject to a recorded mortgage must be assumed to have relied upon the personal responsibility of the other party to the contract and upon such liens as the statute grants in definite terms, and not upon the expectation of displacing the priority of mortgage liens. *The argument that there is some sort of superior equity in claims for work and materials over liens for money previously advanced upon mortgage is without merit and the chancellor cannot apply such a principle either to displace vested liens or to broaden a lien statute by a construction which disregards absolutely the rights in a mortgage security.*" (Our italics.) (Allis Chalmers Co. vs. Central Trust Co.)

The necessity of respecting the priority of mortgage liens was recognized by the Legislature of the State of Idaho, for the statutes of that State provide, and have provided for many years, that mechanics' liens shall be subject and subordinate to mortgages executed and recorded before the labor or material was furnished. Section 5114 of the Idaho Revised Codes, relative to the dignity and priority of mechanics' liens and mortgages, reads as follows:

"The liens provided for in this chapter are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other encumbrance, of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished."

The Supreme Court of Idaho in construing this statute, in Pacific States, etc. Co., vs. Dubois, 11 Ida. 319, 325, said:

"All liens for labor commenced and materials commenced to be furnished prior to recording said mortgages are prior and superior liens to said mortgages, and the liens of all laborers for labor commenced, and of material men for material commenced to be furnished, subsequent to the recording of said mortgages, are subordinate to said mortgages, when such work is done and material furnished by persons not theretofore connected with the construction of the building. If that were not intended, why did not the Legislature simply say that all liens for labor and material furnished in the erection or construction or repair or change of a building took effect from the commencement of the construction of such building or of such repair or changes? It is clear to me that the Legislature in-

tended to make all liens for work commenced and materials commenced to be furnished after the recording of a mortgage subsequent and inferior thereto, especially when such work is done and materials furnished by persons who had no connection with the erection of the building until after the recording of the mortgages."

Mechanics' liens are entirely statutory, and they can have only such dignity and priority as the statute confers upon them. There is no principle of equity upon which mechanics' liens can be preferred to mortgages. In fact the commercial law of the country would be entirely unsettled if contract or mortgage liens could be displaced whenever the chancellor thinks some other party, although later in time, has acquired a superior equity through some service rendered or materials furnished the mortgagor.

In the case at bar Maney Brothers & Co., the mortgagees, constructed the reservoir. No work whatever upon that structure has been done by any one except Maney Brothers. Not one dollar was paid them for such construction, but instead of filing a mechanics' lien they arranged in advance that they should have a first mortgage lien upon the structures so constructed by them, as well as upon the water rights, rights of way and other property owned by the mortgagor. Subsequently some payments were made upon the mortgage until the amount was reduced to about $40,000.00, with interest.

By the decision of the trial court the mortgage lien of Maney Brothers is practically displaced as to

the entire reservoir, and the lien of others, who did not contribute in any way towards its construction, is attached to that property and the property is permitted to be conveyed to the Districts free and clear of encumbrances. It should be noted that the decree provides that the interest of the Districts in the reservoir is such as to leave practically no interest in the present structure subject to Maney Brothers' mortgage. (See Par. VIII of Decree, Trans. pp. 209-210.)

In this connection we desire to call attention to the fact that the canals and works constructed by other contractors, (and such construction work did not commence until some eighteen months after the mortgage had been given and placed of record), are entirely separated from and in no way connected with the reservoir.

There can be no important controversy here between appellants and the mechanics' lien claimants. Their relative priority and relation are determined by the Idaho statute quoted above and the decision of the Idaho Supreme Court construing such statute, and the many decisions of the courts holding that the rights of a mortgagee are as much entitled to consideration in equity as the rights of mechanics' lien claimants.

The Court in Allis-Chalmers Co. vs. Central Trust Co., of New York, 190 Fed. 701, 705 (C. C. A.) states the law correctly on this subject when it says:

> "The argument that there is some sort of superior equity in claim for work and material

over liens for money previously advanced upon mortgage is without merit, and the chancellor cannot apply such principle either to displace vested liens or to broaden a lien statute by a construction which disregards absolutely the rights in a mortgage security."

We find no authority for the statement in the opinion of the learned Judge in the court below (Trans., p. 189), "That the lien of those who, by supplying labor and material created the property, * * * was superior to the mortgage lien is scarcely open to controversy." This statement of the law is directly contrary to the statutes of the State and the decisions of the Idaho Supreme Court, and we believe no support for such a doctrine can be found anywhere.

Again we call the attention of the Court to the facts. Appellants constructed the reservoir, commencing about the first of October, 1911, and took a mortgage upon all the property of the Crane Creek Company for the cost of such construction. The contract with Slick Brothers' Construction Company was entered into in April, 1913, with full notice of the mortgage. The contract covered the construction of canals, laterals, pipes, siphons and flumes all situated miles away from the reservoir which appellants had constructed, and all situated on lands and rights of way owned by the Crane Creek Company and covered by appellants' mortgage given some eighteen months before Slick Brothers' contract was entered into. Before any structures were built on

these rights of way appellants' mortgage was admittedly a first and prior lien on such lands and rights of way and on the water rights under which water was being stored in the reservoir.

The entry of the contractors and material men upon the mortgaged property surely could not operate to displace the mortgage lien. Such is not the law in the case of mortgages on farms, town lots or railroads, and the mortgage lien in the one case is as sacred, binding and effectual as in the other.

It is not clear on what theory the District Court held that appellants were not entitled to a mortgage lien upon the interests in the irrigation system conveyed to the Districts. There are some statements in the opinion from which we infer that the learned trial Judge applied the doctrine of relation in such a way as to hold that because the Districts had entered into an executory contract prior to the giving of the mortgage to purchase such interest, provided the works were completed according to specifications and within a certain time, they could ignore the mortgage and deal with the mortgagor as if the mortgage did not exist, and make payment to the mortgagor direct or to the mechanics' lien claimants. There are also statements in the opinion that indicate that the court considered that the mechanics' lien claimants had a prior and superior lien to appellants' mortgage, not only as to the canals and structures upon which work was performed by such claimants, but also as to the reservoir—an independent structure—constructed by the appellants, and that the Districts

could pay the mortgagor direct and if the mortgagor used the purchase price, or the proceeds of the bonds, in the discharge of such mechanics' liens and no residue or balance remained for application on the mortgage, the lien of the mortgage would cease when the funds were exhausted; and the Court suggests that appellants have no grievance against the Districts for the reason that there is no evidence that there was any residue or balance, thus apparently throwing the burden of proof on appellants of showing that the mortgagor and the Districts had not expended all the proceeds from the sale of the District bonds for the satisfaction or discharge of valid mechanics' liens.

The court says in its opinion, (Trans. p. 189):

> "It was the right of the Districts to see that the purchase price was applied to the discharge of the superior liens; those of contractors, laborers and of material men. If we assume that thereafter it was their duty to withhold from the vendor and pay to the mortgagees the balance, it need only be said that there was no showing that there was any balance."

No authorities are cited in support of this view, but in the forepart of the opinion, in connection with another phase of the litigation, reference is made to two cases, resting, however, upon an entirely different principle of law not at all applicable under the facts of this case, and it may be that the court based the statement quoted above upon a supposed analogy

to the cases previously cited, viz: Creer vs. Cache Valley Irrigation Co., 4 Ida. 280, 38 Pac. 653, and Garland vs. Irrigation Co., 9 Utah 350, 34 Pac. 368. Neither of these cases is in point. The decision in those cases rests upon an entirely different principle of law. There the canals in question were constructed over the vacant, unoccupied, and unappropriated public domain and the title of the mortgagor to the rights of way and canals in question rested wholly upon Sections 2339 and 2340 of the United States Revised Statutes, and under those statutes the title did not pass to the mortgagor until the canals had been constructed, and the title therefor came to the mortgagor with the lien of the contractor's already impressed upon the property, for the lien of the contractors attached from the beginning of the construction and attached as the construction proceeded; whereas the title from the Government to the Company did not pass until the canals had been completed.

In those cases the courts clearly recognized the distinction between property created by the contractors and to which mortgagor did not acquire title until after it was created, and similar property created upon the rights of way and lands owned by the mortgagor before the improvements were made.

In the case at bar the mortgage in the strongest terms covers after-acquired property and improvements built upon the rights of way owned by the Company, and there can be no question as to the validity of a mortgage on after-acquired property.

Neither is there any question about the canals and structures being built upon rights of way either acquired directly in the name of the Crane Creek Company or in the name of E. D. Ford, and by him conveyed to the Company. The rights of way over the Government land were acquired directly from the Government by the filing in the United States Land Office of maps and applications therefor as required by the Act of January 21, 1895, (28 Stat. L. 635) and the amendments thereto and the rules and regulations of the Department of the Interior; and rights of way over the private lands were acquired by deeds from the owners. (See plaintiff's Exhibits 3, 4, 5, 6, 13, 25 to 33, inclusive).

The mortgage provides that the mortgagor "has granted, bargained, sold, conveyed, assigned, transferred and set over * * * all property (whether real, personal, or mixed) which the said mortgagor now has or may hereafter acquire, and particularly the following described property, to-wit: (here follows description of reservoir site and the rights of way therefor acquired by approval of application by Thomas Ryan, Acting Secretary of the Interior, October 26, 1907) * * * (b) All canals, ditches, headgates, flumes, pipe lines, laterals and other structures, dams and works * * * now owned or constructed, or which may hereafter be acquired or constructed by the mortgagor, with the rights of way therefor * * *. To have and to hold all and singular the above described real, personal and mixed property * * * water rights and permits, rights

of way, reservoirs, dams, canals, flumes, pipe lines, ditches and other structures forming a part of said irrigation system now owned by the mortgagor, or hereafter constructed or acquired by the mortgagor, with all the easements, rights of way, privileges, and appurtenances thereunto belonging, or in any wise appertaining." (Trans. pp. 29-34).

We deem it necessary to cite but a few of the many authorities on the subject of a mortgage of this character covering property acquired or created after the execution of the mortgage.

In the case of Mitchell vs. Winslow, Fed. Cas. No. 9673, Mr. Justice Story said:

> "It seems to me a clear result of all the authorities, that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily or with notice, or in bankruptcy."

In Galveston H. & H. R. Co., vs. Cowdrey, 11 Wall, 459, 20 L. Ed. 199, 206, the Court said:

> "As to the first point, without attempting to review the many authorities on the subject, it is sufficient to state that, in our judgment, the first,

second and third deeds of trust, or mortgages, given by the Galveston Railroad Company to the trustees, estops the Company, and all persons claiming under it and in privity with it, from asserting that those deeds do not cover all the property and rights which they profess to cover. Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the Company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust deeds could safely be given thereon."

If a mortgage or a railroad right of way, which includes after-acquired property, will cover all the structures built upon such right of way as against lien claimants who have built the road, manifestly the case of an irrigation project can not be distinguished.

An examination of the opinions of the Supreme Court of the United States and of the Supreme Court of Utah in the Garland case shows clearly that those

decisions rest upon a single exception to the rule, based entirely and solely upon the fact that the structures were built by the mechanics' lien claimants upon public lands where no rights of way had been acquired and where title to the structures passed to the mortgagor under the provisions of Section 2339 and 2340 of the Revised Statutes of the United States.

The Supreme Court of Utah said (34 Pac. 368, 370):

> "*When mechanics, material men, or other persons make improvements on land on which there is a mortgage or trust deed, such mortgage or trust deed will be superior to the lien to secure the mechanics or other persons;* but the water and irrigation company had no ditch or canal which the deed of trust could transfer to the trustees, until Corey Bros. & Co., by their labor, brought it into existence, and as fast as they constructed the canal their lien attached to it. The trust deed could not transfer the canal from the water and irrigation company to the trustee until it was constructed; until the property came into existence. Under the mechanic's lien law relied upon, we do not think a man can execute a deed of trust on a canal to be constructed *on the public lands*, and then employ men to build it, and after they have done so, and claim the security of the lien, turn upon them, and say he had transferred the property to a trustee before their labor had brought it into existence." (Our italics.)

The Supreme Court of the United States, 41 L. Ed. 327, 335, says:

> "*The point is that the mortgagor never had any claim or title, of a legal or equitable nature, to the land upon which this work was done during the whole time that the work was going on*, and when the title did thereafter vest in the Bear Lake Company by virtue of the work done by Corey Brothers & Company, it became burdened with the lien created by virtue of the work so done upon it. *If prior to the doing of the work the Bear Lake Company had simply purchased the land, or entered into any such agreement with the owner thereof as gave it an equitable title to the same, then the property would not have come to the Bear Lake Company burdened with any lien*, and the work thereafter done upon it in the shape of digging the ditch, etc., would not have given ground for any priority of lien as against the mortgage of the Trust Company.
>
> "The material fact to remember is that the sole title to the land or the right of way, which the Bear Lake Company has, whether legal or equitable, is transferred to that company only by virtue of the work previously done upon the land by the constructors, who thereby fulfil the condition upon the performance of which such transfer or the right of such transfer depends." (Our italics.'

For the reasons hereinbefore stated, the exceptions upon which the decision in those cases rests do not

apply to the case at bar. In fact appellees have never contended that the doctrine of those cases had any application to this case, and it is not clear that the learned Judge of the court below so considered it, as they were not cited in support of the view that the mechanics' liens had any priority over the mortgage.

The appellees Crane Creek Irrigation District and Sunnyside Irrigation Districts never contended that the mechanics' liens had priority over the mortgage. Their contention was that neither the mortgage nor the mechanics' liens were valid liens against the interests conveyed by the Crane Creek Company to the Districts. Their defense against the liens and mortgage is set forth in paragraph XVII of the answers of the two Districts, (Trans. pp. 66-70, 81-86); and, briefly stated, the contention of the Districts was that they had been organized under the irrigation district laws of the State of Idaho and were public or quasi-municipal corporations; that they had issued their bonds in payment for an interest in such irrigation system; that appellants when they took their mortgage knew the public character of the Irrigation Districts, and knew that the irrigation system would be built with the view of selling an interest therein, to said appellees, and that said proposed irrigation system was, or would be, dedicated to a public use, viz., to the irrigation of lands in said Districts, and that a valid lien or mortgage could not be created by the mortgagor upon the interest in said irrigation system which it proposed or in-

tended to convey to the Districts if they complied with the terms of their respective contracts. After stating the facts as to their organization and public character and alleging that appellants had knowledge thereof and knew of the contract between the Crane Creek Company and the Irrigation Districts, the answer of each of the Districts concludes with the statement of the reasons or legal proposition upon which the appellees rest their contention that appellants' mortgage is not a lien upon the interests conveyed to the Districts. That part of the answer is as follows, (Trans., pp. 70 and 86):

> "In consideration of the premises said defendant alleges upon its information and belief that the said Crane Creek Irrigation Land & Power Company was not authorized in law to charge the property aforesaid, and as described in the said mortgage and cross-complaint herein, with the mortgage lien for the payment of the costs of construction as hereinbefore stated, and that the said cross-complainant herein, Maney Brothers & Company, a co-partnership, had no authority to so contract with the said Crane Creek Irrigation Land & Power Company, and that the said mortgage is not and cannot be charged as a lien upon or against any the lands and property therein described, which are situate within the boundaries of this defendant, Sunnyside Irrigation District, or which is necessarily connected with or required for the effectual use and operation of its said system and to that extent the same is null and void."

Appellees, therefore, based their defense squarely upon the proposition that the mortgagor was powerless to create any lien upon the property which it afterwards intended to convey to the Districts, because of the public character of such Districts and the public use to which the property would be devoted after it had been conveyed to the appellees. Upon that theory and upon those issues the case was tried and evidence introduced, and the cause argued and submitted to the court. The learned District Judge disregarded or rejected the only defense made by the Districts to the enforcement of appellants' mortgage, and there can be no question but the court was right in holding that the defense referred to was wholly insufficient in law.

In justice to appellees and their counsel, we should also say that the theory upon which the Court held the mortgage inoperative as against the interests conveyed to the Districts originated entirely with the Court after the cause had been submitted, and was not proposed or urged by appellees. The issues, therefore, which appellants are now required to meet are not the issues upon which the case was tried and submitted in the court below. The views of the court below cannot prevail. Vested rights under a valid mortgage are thereby destroyed, and the mortgagee given no protection whatsoever.

As illustrative of how appellees were permitted to play fast and loose with the mortgaged property after the mortgage was given, we call attention to the original contract of August 22, 1910, with the Sunny-

side Irrigation District, which provided that that District had the right to purchase an undivided 35.26 per cent interest in the water rights and irrigation system to be constructed by the Crane Creek Company (Trans. p. 104); whereas the decree in the case gives the Sunnyside District an undivided 47.2 per cent or nearly 12 per cent more than the contract of August 22, 1910, required the Crane Creek Company to convey to that District.

Appellants' mortgage expressly permitted the Crane Creek Company to carry out the contract of August 22nd, (Trans. p. 37) upon certain conditions which, when complied with, would entitle the Districts to a release of the mortgage as to the interests to be conveyed thereunder to the Districts. Had that contract been carried out according to its terms, and if the law were as applied by the lower court in this case, then the Crane Creek Company's interests in the system would now be substantially 12 per cent greater than it is, all of which would be under appellants' mortgage. The complete disregard of appellants' mortgage disclosed by the record, seems almost shocking and cannot be justified upon any theory.

Pages 124 to 150 of the transcript of the record are taken up with contracts between appellees, or one or the other of them, and the Crane Creek Company, modifying and changing the contracts of August 22, 1910, after the mortgage was given and all without the knowledge or consent of the mortgagee; in many cases the changes are most material. Among other things, the manner of payment was changed, and it

was agreed under a contract between the Crane Creek Company and the Districts, dated October 16, 1913, that the District bonds were to be sold at 60 per cent of their face or par value, and that the money should be deposited in the First National Bank of Weiser as Trustee for the Districts, and that such money should be paid to the Crane Creek Company only in such amounts and at such times as the Board of Directors of the District might authorize. (Trans. pp. 140-141 and 162).

If the Districts and the Crane Creek Company as late as October 16, 1913,—two years after the mortgage was given and while all parties had full notice and knowledge of the terms of the mortgage—could agree that the bonds of the Districts should be converted into cash on the basis of 60 per cent of their par value, it is not surprising that the trial court found that there was no evidence that there was any balance to apply on the mortgage.

The conclusion seems justified that, in the opinion of the trial court, the Districts had the right to pay the purchase price, direct to the mortgagor or to claimants, who had furnished labor or material towards the construction of the system, and that the mortgagees have no claim against the Districts as long as the Districts can show that they had paid to some one the full amount of the purchase price. In other words, the Districts could select the creditors of the mortgagor that should be paid, or they could pay the money direct to the mortgagor. If that be the law, then a mortgage on property subject to an execu-

tory contract is of no value whatever, for it affords no protection to the mortgagee; it gives him no right against the mortgaged property which the parties to the contract are compelled to respect.

We pass now to a consideration of another question raised by the Court and that apparently led to the conclusions reached in this case, viz: whether under the doctrine of relation the deeds to the Districts relate back to the date of the original contracts so as to cut off the lien of appellants' mortgage.

THE DEEDS TO THE DISTRICTS CAN NOT RELATE BACK TO THE ORIGINAL CONTRACTS SO AS TO CUT OFF THE LIEN OF APPELLANTS' MORTGAGE.

The crucial point in this case would seem to be the application of the doctrine of relation. It is conceded that a deed takes effect only from delivery, but that in certain cases a deed may relate back to the time of a contract for the purchase of the land conveyed. The trial court held that the case at bar was such a case, notwithstanding the fact that the application of the doctrine destroyed practically all of the security for the intervening mortgage of appellants on which over $35,000.00, with interest for a year and a half was due.

We contend that the Crane Creek Company had a right to mortgage its interest in this irrigation system and these contracts to appellants; that the Districts had at most only an equitable interest in the project prior to the making of the various deeds

purporting to convey them the legal title, and the Districts having paid the Crane Creek Company for the system after notice of appellants' mortgage, did so at their peril; and finally that the doctrine of relation is a mere fiction of law and is never allowed to operate to the prejudice of third persons, and particularly not so as to restrict or destroy the rights of an assignee of the vendor's interest in a contract of sale.

Under an ordinary contract for the sale of realty the equitable title to the property vests in the purchaser when the contract is executed and the legal title remains in the vendor as security for the purchase money unpaid.

39 Cyc. 1301-1303.
1 Pomeroy Equity, Sec. 368, 372.
3 Pomeroy, Sec. 1260.

In 3 Pomeroy, Sec. 1261, the author says:

> "He (the vendor) holds the legal title as security for the performance of the vendee's obligation, and as trustee for the vendee, subject to such performance, and *that title may be conveyed* or devised, and will descend to his heirs."

In Gessner vs. Palmater, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187, the Court said: (13 L. R. A., page 188.)

> "Where the vendor holds the legal title under an unexecuted contract for the conveyance of the land upon payment of the purchase money, the transaction shows upon its face that he holds it

as security. The vendee cannot prejudice that title, or in any way devest it, except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security. Stevens vs. Chadwick, 10 Kan. 413. It has been called an 'imperfect' or 'equitable' mortgage, which is a more appropriate term than 'vendors' lien.' Moore vs. Lackey, 53 Miss. 85. In many of the best-considered cases, including Sparks vs. Hess, supra, it is treated as if it had the similitude of a mortgage, subject to foreclosure in the same way a mortgage is foreclosed. There is no necessity for any lien by implication. Where the title is not to pass until the vendee pays the purchase price, the land is by express contract held in pledge for such payment, and the notes and contract may be considered as an instrument in the nature of a mortgage. It is a lien by contract, is an incident to the debt, and the assignee of notes given for the purchase money, like the assignee of a note secured by mortgage, is entitled to the benefit of the security. Avery vs. Clark, 87 Cal. 619 (filed February 6, 1891); Wright vs. Troutman, 81 Ill. 374; Adams vs. Cowherd, 30 Mo. 460; Lowery vs. Peterson, 75 Ala. 109; Bradley vs. Curtis, 79 Ky. 327; McClintic vs. Wise, 25 Gratt. 448; Lagow vs. Badollet, 1 Blackf. 419; Dingley vs. Bank of Ventura, 57 Cal. 471."

The law on this point is well stated in the brief opinion in Taylor vs. McKinney, 20 Cal. at page 620, which is as follows:

> "This is an action to recover the purchase money of certain real estate, and to enforce a vendor's lien for its payment. It is unnecessary to notice the points raised upon matters of evidence, except to say that there is nothing in them to justify us in disturbing the findings. The case, in other respects, is similar to that of Sparks vs. Hess, (15 Cal. 186) the only difference being that here the contract has been assigned, and it is claimed that the lien of a vendor is not assignable. The vendor not only assigned the contract, but executed to the assignee a conveyance of the property; and there is no doubt that the effect was to vest in the latter all the rights and equities pertaining to the former. The assignee holds the title as security for the payment of the money, and it would be an anomaly in legal proceedings if this security could not be enforced as a lien upon the property."

See also:

39 Cyc. 1664, 1665.

Avery vs. Clark, 87 Cal. 619; 25 Pac. 919.

Lagow vs. Badollet, 1 Blackf. 416, 12 Am. Dec. 258.

Nat. Bank of Com. vs. Lock, 17 Wash. 528, 50 Pac. 478.

If this interest can be conveyed outright it can be mortgaged, for Sec. 3403, Idaho Revised Codes, pro-

vides, "any interest in real property which is capable of being transferred can be mortgaged," and if the interest of the Crane Creek Company is considered more as in the nature of personal estate, the mortgage is clearly sufficient as an assignment of the right of the Crane Creek Company to collect the balance of the purchase price for the system.

In Lamm vs. Armstrong, 95 Minn. 434, 104 N. W. 304, 111 Am. St. Rep. 479, 5 Ann. Cas. 418, the Court held that a subsequent cancellation of a contract for the sale of realty by the vendor did not affect the rights of a party to whom he had assigned such contract as security for a loan. The note on this case in Vol. 5, Am. & Eng. Ann. Cases, contains a valuable collection of the authorities on this point.

The Court said: (Am. St. Rep., page 481.)

> "It is elementary, in cases of executory contracts of this nature, that the vendor continues in a strict legal sense the owner of the land until the purchase price is paid; the vendee holding only the equitable title, the legal title remaining in the vendor as security: Minneapolis etc. Ry. Co., vs. Wilson, 25 Minn. 382; Berryhill vs. Potter, 42 Minn. 279, 44 N. W. 251. With the legal title in the vendor, he would have the clear right to mortgage the property, either by an assignment of the contract of sale or directly by execution of a formal instrument for that purpose. Either of which would, of course, be subject to all the rights of the vendee. It is certain that the parties to this transaction had in mind adequate security for the pay-

ment of the indebtedness to Lamm, and the result of their action must be held to effectuate their intent, to have created the relation of mortgagor and mortgagee between them: 11 Am. & Eng. Ency. of Law, 2d ed., 129, and cases cited. The assignment was, in effect, a transfer to the assignee of the assignor's lien for the purchase price of the land. The fact that Armstrong subsequently canceled the contract by an agreement with the vendee does not affect the rights of Lamm."

At most the interest of the irrigation districts under the contracts of August 22nd, 1910, was merely the right in equity to compel a conveyance of the system upon full payment by them and performance of all their obligations, and we do not think these contracts conveyed an equitable interest in the real estate. The contracts were wholly executory when appellants took their mortgage. Not a dollar had been paid and no work had been done since the contracts had been made. Furthermore, these were not contracts which a court of equity would specifically enforce at that time, because they involved the construction of a large irrigation project which it was estimated would occupy nearly two years. It is well settled that courts of equity will not enforce such contracts.

See:

Texas & Pac. Ry. Co. vs. Marshall, 136 U. S. 393, 34 Law Ed., 385-390.

Farmers' Loan & Trust Co. vs. Burbank P. & W. Co., 196 Fed. 539.

Under these circumstances the Districts did not and could not have an equitable interest in the project until they were in a position to compel specific performance of the obligations of the other party. That is to say, if the Crane Creek Company had constructed the project and refused to convey the Districts after full performance on their part could have compelled a conveyance.

The position of the Districts under this contract is well illustrated by the case of Smith vs. Jones, (Utah), 60 Pac. 1104, where the Court states:

> "Nor was the nature of the contract such as to create an equitable title in the purchasers. Smith could not enforce performance on the part of those with whom he contracted. The consideration of $5,000 was to be paid only out of the mineral to be produced, and the mineral was a thing not in esse, but formed a part of the earth, and the agreement contained no provision by which its production could be compelled, and there was no obligation to convey the land until the consideration was paid. The agreement was but an option to purchase, and gave to the prospective purchasers a right to extract ore. 'A mere contract or covenant to convey at a future time on the purchaser performing certain acts does not create an equitable title. It is but an agreement that may ripen into an equitable title. When the purchaser performs all acts necessary to entitle him to a deed, then, and not till then, he has an equitable title, and may compel a conveyance. Bisp.

Eq. Sec. 365. When the purchaser is in a position to compel a conveyance by a bill in chancery, he then holds the equitable title. Before that he only has a contract for a title when he performs his part of the agreement'."

To the same effect are:

Bartlesville Oil Co. vs. Hill, 30 Okla. 829, 122 Pac. 208.

Younkman vs. Hillman, 53 Wash., 661, 102 Pac. 773.

But if we assume that the Districts had an equitable interest in the project by virtue of their contracts, nevertheless appellants' mortgage was valid and gave a lien upon the legal title held by the Crane Creek Company as security for the payment of the purchase price, and this lien transferred to appellants' the right to receive such payments until their mortgage was satisfied. Actual knowledge of appellants' right is clearly brought home to both Districts (Trans., page 159 and page 165), and payments made by the Districts to the Crane Creek Company were made at their peril. This is clearly shown by the case of Laughlin vs. North Wisconsin Lbr. Co., 176 Fed. 772, where at page 777 the Court states:

"Every purchaser of land by executory contract knows that the vendor has the *jus disponendi.* The land is not made inalienable merely by contracting to sell it. In case of a transfer the vendor has no right to receive the money if the

vendee knows of the conveyance. If he pays the vendor, he may have to pay again."

This decision is affirmed by the Circuit Court of Appeals in 193 Federal, page 367.

In Southern Bldg. Assn. vs. Page, 46 W. Vir. 302, 33 S. E. 336, one Page gave a title bond to Miller for a half interest in a piece of property and later gave a trust deed of all his property to plaintiff as security for a $5,000.00 loan. Both the bond and the deed were recorded. Miller claimed to have paid Page and Page had given him a deed after the date of the mortgage. It was held that Miller could not pay Page except at his own risk and peril, but should have paid the plaintiff; that it was a fraud for Page to receive the money and Miller could not take advantage of such fraud, and finally that Page's subsequent deed was of no effect until the trust deed was released.

In Mutual Aid etc. Co. vs. Gashe, 56 Ohio St. 273, 46 N. E. 985, one Ransom made a contract of sale to the Ohio Company which went into possession and began construction of a manufacturing plant. After rights to mechanics' liens had been initiated by such work Ransom deeded the property to Paine and Paine mortgaged it to the plaintiff. Shortly after the mortgage he gave the Ohio Company a deed. The contest was between the lien claimants and the mortgagee, and the Court held that the mortgagee had priority over them to the extent that the purchase price was unpaid at the date of the mortgage. The

following passage from the Court's opinion gives an accurate statement of the law:

> 'The right of one who enters into a contract to convey land, but retains the legal title, and is not bound to convey it to the purchaser until full payment has been made, stands upon a different and more substantial foundation than one who has conveyed his land away. Whatever the rights of the latter may be, and howsoever easily lost, the former has reserved to himself the title, and can be divested of it only by a full compliance with the terms of the contract. This legal title he can convey to another, subject, however, to the rights of the prior vendee; but the rights of the prior vendee against the new owner of the legal title are no greater than they were against his vendor. It is within the power of the original vendor to convey to any purchaser the legal title, and such purchaser will stand in the shoes of his grantor. In the case under consideration, Ransom, the vendor of the Ohio Lumber & Manufacturing Company, conveyed the legal title to Bartram L. Paine. By this conveyance Paine became vested with every right that Ransom had previously possessed. While the legal title was in Paine he conveyed it by way of mortgage to the plaintiff in error, the Mutual Aid Building & Loan Company, to secure a loan of about $5,000. This Paine had a perfect right to do, and by this mortgage he conveyed to the Mutual Aid Building & Loan Company every right possessed by

him, which as we have seen, was precisely those that the original vendor, Ranson, had under his contract of sale; and that was that the balance of the purchase price should be paid before the vendee, the Ohio Lumber & Manufacturing Company, was entitled to receive an absolute conveyance for the lots. The rights of the mortgagee, the loan association, having become fixed by the execution to it of the mortgage, it had no further concern about the actions of Paine, its mortgagor. His subsequent action could not impair its rights. *His deed conveying these seven lots to the Ohio Lumber & Manufacturing Company, executed and delivered after the mortgage lien had attached, did not impair that lien.* True, it placed the legal title in the grantee, but the 'interest' of the grantee was not thereby enlarged. Its obligation to pay the purchase price before the ownership became complete still remained. This obligation has assumed a new form. Instead of being embodied in a contract for the sale and purchase of the lots in question, it was evidenced by the mortgage thereon. Nevertheless, it was in fact the same. Houck, Liens, Sec. 145. Courts of equity, in reaching their conclusions, regard the substance of things, rather than their mere forms."

In some of the cases on this subject we find that the purchase money, notes and other evidences of indebtedness have been transferred to one person and the legal title in the property conveyed to another. That was the case in Georgia State Assn.

vs. Faison, 114 Ga., 655, 40 S. E. 760, where it was held that the transfer of the notes carried the lien. The Court said:

> "The purchaser of the vendor's interest is entitled to call for the balance of the purchase money as the representative of the vendor."

In the present case the entire interest of the Crane Creek Company, including the contracts with the Districts were transferred, and the Districts had full knowledge of the transfer so there can be no question but that they paid the Crane Creek Company at their peril.

In the case of Ten Eick vs. Simpson, 1 Sandf. Chanc. (N. Y). 244 it was held that under similar circumstances the vendee must pay the vendor's assignee in order to get a clear title, although he had already paid the vendor. Other cases in support of the above rule are:

Elliott vs. Delaney, 217 Mo. 14, 116 S. W. 494.
Tait vs. Reid, (Iowa) 139 N. W. 1101.
Minaker vs. Sunset Etc. Assn., Cal. App. 145 Pac. 542.
Fargo vs. Wade (Ore.) 142 Pac. 830.
Wright vs. Troutman, 81 Ill. 374.
Lowery vs. Peterson, 75 Ala. 109.
Adams vs. Cowherd, 30 Mo. 458.
Russell vs. Kirkbride, 62 Tex. 455.
McClintic vs. Wise's Administrators, 25 Gratt. 448.

It follows necessarily from the above authorities that the Crane Creek Company had deprived itself by the mortgage to appellants of the power to convey the legal title to any part of this system, otherwise than subject to appellants' mortgage. Nor can the fiction of relation be relied upon to release the irrigation system from appellants' mortgage, because that fiction is only applied as between the parties, and in the interest of justice and not in order to work an injustice to third parties.

The rule is laid down clearly in 1 Devlin on Real Estate, Sec. 264, as follows:

> "A deed takes effect only from the date of its delivery, which may be either actual or constructive. Between the same parties a deed may sometimes, for the furtherance of justice, be permitted in its operation to relate back to the time of the contract for the purchase of the land to be conveyed by the deed; but this effect will not be given to it when wrong would thereby be done to strangers."

This rule has been recognized since the time of Lord Coke when it was announced and followed in the case of Butler & Baker, 3 Coke Reports, 25, 29b.

In Jackson vs. Davenport, 20 Johns. (N. Y.) 536, at page 550, in refusing to allow a deed executed under a power to relate back, the Court states:

> "The doctrine, that a deed executing a power refers back to the instrument creating the power, so that the party is deemed to take under the

deed from the grantor by whom the power was created, and not from the power, is a fiction of law, and so it was considered in *Bartlett vs. Ramsden*, (1 *Keb.* 570) *relatio est fictio juris* according to the resolution in Menvil's case, (13 Co.) and is upheld to advance a right, not to advance a wrong, or to defeat collateral acts which are lawful, and especially if they concern strangers. The limitation of the fiction, so as to prevent it from doing injury to strangers, or defeating mesne lawful acts, is the common language of the books." (Citing cases.)

In Murphree vs. Countiss, 58 Miss. 712, 717, N. made a contract of sale with Murphree. Later, Countiss agreed to pay N, who was to make a deed to Murphree, and the latter agreed to execute a mortgage to Countiss. After he had received the deed Murphree refused to make the mortgage and the Court held Countiss was entitled to a lien on the land, and this lien was not defeated by the deed to Murphree. The Court says:

"Between the time of the execution of the note to Countiss and the reception of the deed by Murphree, the latter held the land under a title bond, which by agreement of all parties had been made payable to Countiss, the assignee of the vendor. Such a lien being assignable will not be defeated by the subsequent reception of the deed, so long as the land remains in the hands of the vendee or his grantees with notice."

The case last cited seems squarely in point, as does also that of Jackson vs. Bard, 4 Johns. 230, 4 Am. Dec. 267. The facts as far as they involve this question were as follows: Smith contracted to buy land from Dickenson in the summer of 1798 and Dickenson mortgaged the same land to Barton, March 8th, 1799. Under this mortgage the land was eventually sold on foreclosure to plaintiffs. Smith obtained a deed from Dickenson March 11th, 1799, and claimed that his title under this deed related back to the date of the contract. The Court refused to apply the doctrine of relation, saying at page 269 of 4 Am. Dec.:

> "The deed from Dickenson to Smith cannot, in its operation, relate back to the time the contract between them was made, so as to bring it within the scope of the decision in the case of Jackson vs. Raymond, 1 Johns. 85, note. It is a general rule, with respect to the doctrine of relation, that it shall not do wrong to strangers; as between the same parties it may be adopted for the advancement of justice: 3 Caines, 263. Barton was a stranger to the contract between Dickenson and Smith, and *it would be the extreme of injustice to permit his mortgage to be defeated, by considering Smith's deed to take effect by relation from the time he made his contract for the purchase of the premises.*"

In Barnes vs. Cox, Neb. 79, N. W. 550, the Court says:

> "The doctrine of relation can not be given effect to the prejudice of third parties who acquir-

ed rights in the property before the actual delivery of the conveyance."

The same Court in Rogers vs. Heads Iron Foundry, 70 N. W. 527, sustained the above rule, citing and commenting upon a great many of the cases involving this question. Other cases to the same effect are:

Eirich vs. Leitschuh, 81 Ill. App. 573.
Pratt vs. Potter, 21 Barb. (N. Y.) 589.
Fite vs. Doe, 1 Blackf. (Ind.) 127.

The same rule is frequently applied where creditors of a vendee levy execution upon his interest before he has received full payment or delivered a deed. In such cases the creditor is entitled only to a lien for the balance of the purchase money due at the date of the levy. It is said in 39 Cyc. page 1557:

"According to the prevailing rule, a judgment recovered against a vendor after the making of the contract * * * and before execution and delivery of a deed is a lien on the legal title and binds the land to the extent of the unpaid purchase money."

And then numerous State decisions sustaining this view are cited. Then the author further states:

"But it does not displace or otherwise impair the right of the purchaser under his contract."

If a judgment can thus become a lien on the vendor's interests, why not a mortgage?

In Tomlinson vs. Blackburn, 37 N. C. 509, it is held:

"Land under contract of sale, but before a conveyance or the payment of the purchase money, was taken on execution against the vendor. Held, that the purchaser under the contract could not be relieved against a purchaser under the execution with notice of the prior contract, except upon paying to such purchaser the price paid by him, or the price under the said contract."

In O'Neil vs. Wabash Ave. Church, 4 Biss. 482, Federal Case 10,531, one Bronson made a contract for the sale of land to O'Neil, payments to be made in installments, and the contract was recorded. Later the land was levied upon under a judgment against Bronson and sold, and a Sheriff's deed given therefor. Still later Bronson gave O'Neil a deed to the property and the controversy was between him and the execution purchaser or his grantee. The Court held that title could not relate back to the date of the contract so as to cut off intervening rights. The Court stated:

"It seems to me that, under such circumstances, where a contract of sale is made, and only a small part of the purchase money paid, and a judgment is afterwards obtained against the owner of the land that judgment binds his interest, whatever it may be, and it is subject to sale under that judgment. It is a doctrine attended with very serious consequences, to hold that, under such circumstances, when a deed is made by a vendor to a vendee, it relates back so as to cut off all equities which may have inter-

vened, and of which it may be the whole world would be obliged to take notice."

In May vs. Emerson, 52 Ore. 262, 96 Pac. 454, at page 455, the Court says:

"It is beyond controversy that the title remains in the vendor until the actual delivery of the deed. The vendor still has not only the legal title, but also an interest in the property as security for the payment of the purchase price; and this interest should be and is available to a creditor through the lien of his judgment, which lays hold of such legal title, and thereafter payments made to the vendor to the vendee are at his peril."

The opinion of the trial court lays emphasis upon the fact that the contract between the Crane Creek Company and the Districts calls for a conveyance to the latter free from encumbrances, but this does not enable these parties to eliminate appellants' mortgage by the mere artifice of a conveyance. Appellants' mortgage of which the Districts had both constructive and actual notice contains the following provisions: (Trans. pages 37 and 38).

"1. The mortgagor shall have the right to carry out its contract with what is known as the Sunnyside Irrigation District, which contract bears date of August 22nd, 1910. But the mortgagees shall not be required to release the lien of this indenture on any of the property herein described, or upon the property to be conveyed under said contract by the mortgagor to said Sunny-

side Irrigation District, until there has been deposited, as additional security for the indebtedness secured hereby, with F. F. Johnson, Cashier of the Boise City National Bank, of Boise, Idaho, as trustee, Seventy-five Thousand Dollars, ($75,000.00) par value of the legally issued bonds of said irrigation district, the legality of which said bonds shall first have been approved by the Supreme Court of the State of Idaho. But upon such bonds being delivered the mortgagees agree to fully release from the lien of this indenture the interest to be conveyed by the mortgagor under its said contract to said Sunnyside Irrigation District.

"2. The mortgagor shall likewise have the right to carry out its contract with what is known as the Crane Creek Irrigation District, which contract bears date of August 22nd, 1910. But the mortgagees shall not be required to release the lien of this indenture on any of the property herein described, or upon the property to be conveyed under said contract by the mortgagor to said Crane Creek Irrigation District, until there has been deposited, as additional security for the indebtedness secured hereby, with F. F. Johnson, Cashier of the Boise City National Bank, of Boise, Idaho, as Trustee, Fifty Thousand Dollars ($50,000.00) par value, of the legally issued bonds of said irrigation district the legality of which said bonds shall have first been approved by the Supreme Court of the State of

> Idaho. But upon such bonds being delivered the mortgagees agree to fully release from the lien of this indenture the interest to be conveyed by the mortgagor under its said contract to said Crane Creek Irrigation District."

Under these circumstances if the Districts wished the property released from this mortgage, they should have seen that District bonds in the requisite amounts were deposited with the trustee, and then and not till then, would they have been entitled to a release of the mortgage. Instead of doing this, they disregarded the mortgage entirely, turned over their bonds to the Crane Creek Company and agreed that the latter might sell the bonds at 60 cents on the dollar and apply the proceeds to discharge the claims of the contractors and material men working on the project, all of whom, as we have shown above, were subsequent encumbrancers, to appellants, in fact only a few of them had any lien on the project. Having thus played fast and loose with appellants' mortgage and having totally disregarded their equities, these Districts should not now be permitted to save themselves by invoking the fiction of relation and thus destroy appellants' security.

In connection with the doctrine of relation, we desire to call the attention of the Court to the fact that it was not the contract of August 22, 1910, that was finally consummated and under which the Crane Creek Company deeded or conveyed undivided interests in this project to the Districts. That contract was modified and changed in numerous particulars

after appellants' mortgage was executed and recorded. Among other things, the interest to be conveyed to the Sunnyside District was increased from 35.26% to 47.2%, and numerous other changes were made that relieved the Crane Creek Company of penalties and made it possible for the Districts to take advantage of their bargain, all without the consent of the mortgagees.

It may well be assumed that the inability of the Districts to carry out the contract of August 22, 1910, according to its terms, was taken into consideration by the mortgagees in extending credit to the Crane Creek Company and taking the project as security. The subsequent contracts show clearly that the changes made were necessary, both from the standpoint of the Districts and the standpoint of the Company; and that if they had not been made the entire project would have been subject to appellants' mortgage and no part of it would ever have been conveyed to the Districts under the contract of August 22, 1910, for that contract could not be carried out by either of the parties to it.

All of the subsequent contracts, including the change in percentage to be conveyed to the Sunnyside District, were totally ignored by the court below, and the doctrine of relation based on the contract of August 22, 1910, applied to all subsequent contracts and changes. We respectfully submit that if the doctrine of relation is applied at all, it can only relate back to the date of the last change or modification of the contract.

An examination of the various contracts entered into by the Crane Creek Company and the Districts and the course of dealing pursued and finally culminating in the deeds from the Crane Creek Company to the Districts, and the payment therefor by the Districts, disclose what we believe to be a flagrant violation of the law of the State governing irrigation districts to an extent that would seem to render the contracts void; and the doctrine of relation can in no event rest on such illegal contracts and wrongful acts, and no rights thereunder can be claimed by any of the parties to the contract so as to prejudice the right of the mortgagees who had a valid, existing mortgage on the project before the pretended conveyances were made by the Crane Creek Company to the Districts. We pass now to a consideration of that question.

The payments from the Irrigation Districts to the Crane Creek Company were made contrary to law, and no rights can be claimed thereunder.

The appellees, Sunnyside Irrigation District and Crane Creek Irrigation District, as appears from the pleadings and record in the case, were organized under the irrigation district laws of the State of Idaho, which are substantially the same as the so-called "Wright Act" of California. Bonds may be issued for two purposes, and only two.

Section 2396 of the Idaho Revised Codes, insofar as it relates to the question under consideration, provides as follows:

"As soon as practicable after the organization of any such district the board of directors shall, by a resolution entered on its records, formulate a general plan of its proposed operations, in which it shall state what constructed works or other property it proposes to purchase and the cost of purchasing the same; and further what construction work it proposes to do and how it proposes to raise the funds for carrying out said plan. * * * * "

This section of the Idaho Code was adopted from the California Statutes in 1903.

Section 2386 of the Idaho Revised Codes, insofar as it relates to this subject, provides that "in case of purchase (of works or property) the bonds of the District hereinafter provided for may be used to their par value in payment."

And Section 2404 of the Idaho Code relative to the sale or disposal of irrigation district bonds provides:

"The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to carry out the object and purposes of this title. Before making any sale the board shall, by resolution, declare its intention to sell the specified amount of the bonds, and if said bonds can then be sold at their face value and accrued interest,

they may be sold without advertisement, otherwise said resolution shall state the day and hour and place of such sale, and shall cause such resolutions to be entered on the minutes, and notice of sale to be given by publication thereof at least four weeks. * * *. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, or may reject all bids * * * provided, said board shall in no event sell any of the said bonds for less than the par or face value thereof and accrued interest."

There are but two ways of disposing of irrigation district bonds. One is to use them at par in payment for property purchased, and the other is to sell them at par and accrued interest after due notice to the public. They cannot be used in payment to contractors for construction work, based on engineers' estimates. In such cases it is a well-known fact that contractors do the work at exorbitant prices and thereby evade the law that the bonds must be sold at par by the Districts. The Legislature has carefully provided that the bonds shall either be sold at par and the proceeds used for the purchase of material and the payment of contractors for the construction of works, or, if property be purchased, the District may use bonds at par in payment for the property.

Long before these statutes were adopted in the State of Idaho they had been construed by the Supreme Court of California, particularly in the case

of Hughson v. Crane, 115 Calif., 404, 47 Pac. 120. After quoting the California statutes, which are identical with the Idaho statutes on this subject, the Court said:

> "These are the only provisions in the act for any disposition by the directors of the bonds of the district; and it follows that the only mode in which they can exercise their power of disposing of the bonds so that they may become valid obligations against the district is either to exchange them for property at their par value or to sell them for money in open market under the restrictions and limitations given in Section 16 at not less than ninety per cent. of their face value. The express provisions giving to the board power to exchange them for certain property at their par value excludes the right of the board to exchange them for any other purpose or to dispose of them in any other manner than by the sale authorized by Section 16."

Later the same Court, in Leeman v. Perris Irrigation District, 140 Calif. 540, 74 Pac. 24, said:

> "There is no express authority anywhere in the act for exchanging bonds for construction work, or for exchanging bonds for warrants issued for construction work drawn upon the construction fund * * *. The board of directors has only such powers as are expressly given or as implied to carry out the main purpose of the act. * * * The authority to dispose of bonds being by express terms limited to two

modes, excludes all others by plain implications. It can not be reasonably said that the power to exchange bonds for warrants issued for construction work is necessarily implied from the express power to exchange bonds in payment for property. And while it is true that the proceeds of bonds sold constitute a construction fund on which warrants for construction work may be drawn, still there is no authority for exchanging bonds for construction work, and there can be no implied authority to exchange bonds for warrants issued for such work. The act directs that in exchanging bonds for property they must bring par, while in selling them in open market —the only remaining mode expressly given—they may be sold for ninety per cent. of their face value."

It should be noted that the California law permits the district to sell the bonds at ninety per cent. of their par value, while the Idaho law requires that they be sold at par. In the case last cited, the Court further said:

"The evident intention of the act is that bonds must be sold (except in the single instance of exchange for property) to the highest bidder in open market for cash, and that construction work must be done on the best terms for cash. One who purchases bonds knowing that they were negotiated in a manner not authorized by law, is not a bona fide purchaser but becomes then subject to any defense existing against them."

It would seem that the contract of August 22, 1910, was intended as a contract of purchase so as to come within the rule announced by the Supreme Court of California, in Stowell v. Rialto Irrigation District, 155 Cal. 215; 100 Pac. 248. But the subsequent contracts between the parties and the course of dealing as it was actually carried out, show such a departure from the rule announced in the case last cited that it does not seem that it can be held that the laws of Idaho approve or permit public and quasi-municipal corporations to transact business and acquire property and incur indebtedness in this manner. The testimony of Mr. Coulter (Trans., pp. 160-165) shows how bonds were delivered upon engineers' estimates from time to time as the work progressed, and how the bonds were permitted to be sold at sixty cents on the dollar, while they were still the property of the Districts and long before the Crane Creek Company was entitled to the bonds, and how the proceeds from the sales were placed in trust for the Districts to be eventually paid out to the Crane Creek Company, upon engineers' estimates, for construction. (See contracts of October 16, and November 21, 1913, covering this matter. Trans., pp. 136-150.)

We submit, therefore, that the mortgagees cannot be deprived of their security by the illegal and unauthorized acts of the Irrigation Districts and the Crane Creek Company. It would seem that the bonds which the Districts claimed to have delivered are not legal or valid obligations of the Districts, but that upon a proper proceeding those bonds will be

cancelled and annulled and held invalid; and the mortgagees should not therefore be deprived of their security and the property released from the lien of the mortgage because of pretended payments in bonds that must afterwards be held illegal and void.

We now pass to a consideration of the resolutions and certificates passed or issued by the Districts recognizing the validity of appellants' mortgage.

THE DISTRICTS ARE ESTOPPED TO DENY THE VALIDITY OF THE LIEN OF APPELLANTS' MORTGAGE ON THEIR INTERESTS IN THE SYSTEM.

Even if it be assumed that the interests of the irrigation districts in this project for any reason are not subject to the lien of appellants, they are estopped on the simplest principles of honesty and fair dealing to set up such a defense.

Maney Brothers Exhibits 5 and 6 are respectively a certificate signed by the Presidents of both Districts and a resolution by the Board of Directors of the Crane Creek District ratifying and confirming such certificate, both of which concede the validity of the lien of appellants' mortgage against the Districts' interests and disclaim any priority by reason of conveyances that have been made or may be made from the Crane Creek Company to the Districts. The Sunnyside District passed a resolution identical with Exhibit 6.

The evidence as to these certificates and resolutions was as follows: Mr. Ford, President of the Crane Creek Company, said:

"I advised the Districts of the giving to Maney Bros. of that mortgage on the system about the time it was given. During the spring and summer of 1913, and frequently thereafter, I had conferences with Maney Bros. about the taking up of their mortgage. They were pressing for payment most of that time. They were going to foreclose during the spring, or the early spring of 1914, and I took those matters up with the district with the view of getting certain statements from the districts recognizing Maney Bros. mortgage. Maney Bros. Exhibit No. 6 is a resolution that I prevailed upon the districts to execute in order to get certain concessions from Maney Bros."

Mr. Coulter, who was Secretary of the Sunnyside Irrigation District and attorney for both Districts (Trans., p. 151), said, at page 154: "I prepared paper marked 'Maney Bros. Exhibit No. 5.' The signatures attached are the genuine signatures of the Presidents of the two Districts." Then, referring to Exhibit No. 6, he says, at page 156: "These resolutions were in duplicate. These were passed by both Districts, identical in form, and they were afterwards transmitted by me directly to Maney Bros."

The certificate, Exhibit 5, Trans., pages 154 to 156, was dated June 15th, 1914, and signed Crane Creek Irrigation District by Chas. C. Cleary, President, Sunnyside Irrigation District, by O. M. Harvey, President, and sealed with the seals of both Districts. It certifies that the Districts entered into

contracts with the Crane Creek Company for the purchase of interests in this irrigation system when constructed, to be paid for in bonds of the Districts, which contracts provided that such interests, when completed, were to be conveyed "free from all liens and claims of every description," that the system has not been completed or final conveyance made, and that there is a mortgage upon the property in favor of appellants. It then continues as follows:

> "And it is conceded that said mortgage is a valid and subsisting lien against said lands as against the Crane Creek Irrigation Land and Power Company and said irrigation districts, and that so far as said Maney Brothers & Co. are concerned, and the said mortgage, the said Crane Creek and Sunnyside Irrigation Districts have no defense against the same, and the conveyances that have been made to said reservoir, and the conveyances that may be made by the Crane Creek Irrigation Land and Power Company to them of the interest in said reservoir, and all conveyances which may be made prior to the satisfaction of said mortgage, will be subject to the lien of said mortgage."

Exhibit No. 6 is a certified copy of the resolution of the Board of Directors of the Crane Creek District passed at the meeting held August 18th, 1914, and is as follows:

> "*Be It Resolved*, By the Board of Directors of the Crane Creek Irrigation District, that the act

of the President of this District in executing and delivering to Maney Bros. & Company in the name and for and on behalf of this District, the following certificate or agreement:

(Setting out Exhibit No. 5 in full.)

be and the same is hereby ratified, approved and confirmed." (Trans., pp. 157-9.)

It is clear from the above evidence that the giving of this certificate and these resolutions prevented foreclosure proceedings by appellants at that time, and in fact no foreclosure was attempted until after defendants had been made a party to the suit brought by the Portland Wood Pipe Company, and their cross-bill was filed herein on the 29th day of December, 1914. This delay in bringing foreclosure proceedings enabled the Districts to get the project completed and final conveyances made to themselves, and additional bond deliveries were made to the Crane Creek Company and the settlement referred to in the Court's opinion (Trans., p. 183) was reached with Slick Bros. Construction Company, the principal contractor on the system, under which bonds and other securities were placed in the hands of trustees by the Crane Creek Company. Based upon this settlement the trial court denied such principal contractor a mechanic's lien on the system, which was clearly a great benefit to appellees. During all this time appellants, relying upon this certificate and these resolutions as admissions that their lien was valid and binding against the Districts, stood back and gave the Districts and the Company an oppor-

tunity to work out their financial difficulties, and now by reason of this leniency on their part the Districts are attempting to penalize them.

The obvious expectation of the Districts in giving the certificate and resolutions was to gain time and to avoid the impending foreclosure; in short, to lull appellants into a sense of security. Whether at that time the Districts intended to live up to their recognition of the lien of appellants or whether at the very time they were making these representations they expected to contest any foreclosure suit which appellants might bring eventually, the record does not show. In either event there would be a flagrant violation of the principles of fair dealing and common honesty. In either case the Districts should be estopped to claim that the conveyances from the Crane Creek Company defeated the lien of appellants or to deny the validity of such lien against their interests for any reason. The trial Court said there were wanting in this case some of the elements of estoppel, but did not specify such elements, and apparently the Court was referring to the fact that these representations were not in regard to existing facts, but rather as to matters of intention or opinion. In certain cases, however, estoppels are raised on such a state of facts.

In 2 Pomeroy, Eq. Jurisprudence, Sec. 877, note, it is said:

> "It must not be understood that no rights would flow from such a statement. A representation of a future intention, absolute in form, de-

liberately made for the purpose of influencing the conduct of the other party, and then acted upon by him, is generally the source of a right, and may amount to a contract, enforceable as such by a court of equity." (Citing numerous cases.)

In the leading case of Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618, a party wrote that he would not claim certain property, and this was held to estop him and his grantee from claiming the property in an action of ejectment. The Court said, at page 619:

> "The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

At page 620 the Court quotes the following, with approval from a Michigan case:

> "There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in

such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect."

The above authorities were followed in the well-considered case of Seymour vs. Oelrichs, 156 Cal. 782, 106 Pac. 88, in which the authorities are fully reviewed. See also Faxton v. Faxton, 28 Mich. 159. This sort of estoppel is closely akin to a waiver and the rule is stated with even greater clearness in the case of Union, etc., Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674, as follows:

"The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others; and by which they have been induced to act. * * * *

"The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if the party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment."

The rule has been adopted in numerous cases, among which are:

Banning v. Kreiter, 153 Cal. 33, 94 Pac. 246.
American Sur. Co. v. Ballman, 52 C. C. A. 204, 115 Fed. 292.
Edison Elec. Light Co. v. Buckeye Elec. Co., 59 Fed. 691.

It is perfectly clear that appellants acted upon these representations to their prejudice, and that the Districts secured a substantial benefit by making them. If this estoppel were urged against a private individual or a private corporation, it would undoubtedly prevail, and we submit that the fact that appellees are *quasi* public corporations can make no difference. Pleas of estoppel are sustained every day against cities, counties and states, and irrigation districts have no peculiar right to indulge in unfair dealings. The boards of these two districts had power to contract for the irrigation system, and did so contract. They could have purchased a system free from liens or subject to liens. Appellants' lien was on the property before they acquired it, and the only question was whether they were going to take subject to such lien or free from it. Appellants were entitled to assume that the Districts would hold back enough of the purchase price to protect themselves against the failure of the Crane Creek Company to pay off this lien, and appellants should not be made to suffer because the Districts did not do this.

The Supreme Court of Idaho in Boise City vs. Wilkinson, 16 Idaho, 150 to 178, 102 Pac. 148, in upholding a plea of estoppel against the City, said:

> "Courts of equity are established for the administration of justice in those peculiar cases where substantial justice cannot be administered under the express rules of law, and to adopt a rigid rule that recognizes no exceptions would be to rob such courts of much of their efficacy and power for administering even-handed justice. The people in their collective and sovereign capacity ought to observe the same rules and standard of honesty and fair dealing that is expected of a private citizen. In their collective and governmental capacity, they should no more be allowed to lull the citizen to repose and confidence in what would otherwise be a false and erroneous position than should the private citizen."

The same rule was adhered to in Portland vs. Inman-Poulson Lbr. Co. (Ore.), 133 Pac. 829, 46 L. R. A. (N. S.) 1211, where the representation was that the city would never claim the right to open certain streets. In that case the court said:

> "There is not one rule of morals for a municipality and another for an individual."

Other cases upholding estoppels against public corporations under circumstances similar to the present are:

> Board etc. of Arapahoe County vs. Denver, 30 Colo. 13, 69 Pac. 586.

Hubbell vs. City of South Hutchinson, 64 Kan. 645, 68 Pac. 52.
State of Indiana vs. Milk, 11 Fed. 389.

We accordingly submit that even if the Districts ever had a right to contest the validity of appellants' mortgage as against their interests in this system, they effectively estopped themselves from so doing by the certificate of June 15, 1914, which was subsequently ratified by their Boards of Directors in regular meeting.

ATTORNEYS' FEES.

The trial court awarded appellants $1,000.00 attorneys' fees for foreclosing a mortgage aggregating $40,150.00 and covering property involved in complicated descriptions and affected by numerous liens and claims. The circumstances surrounding the foreclosure were of such a character that the greatest care was required in order to ascertain the parties interested in the property, either as owners, lien claimants, or otherwise, and the nature and extent of their respective interests. The fees allowed were a little less than two and one-half per cent. (2½%) of the amount due under the mortgage. The parties to the suit were numerous and service had to be obtained on many of them out of the State through the issuance and service of warning orders.

The mortgagees in their bill ask for an allowance of $4,000.00 for attorneys' fees on this account. The only evidence in the case is that of ex-Governor

James H. Hawley, a distinguished member of the Idaho Bar for upwards of forty years. Governor Hawley testified that, in his opinion, $2,500.00 would be a very reasonable fee. (Trans. pp. 172-179).

Apparently the only reason why the learned trial Judge disregarded the evidence and fixed the amount at $1,000.00 was the fact that he concluded appellants were not entitled to a mortgage upon the interests in the system conveyed to the Districts, and the further fact that counsel for appellants also represented other parties to the suit. The latter we respectfully submit should not be considered. That is not an element that should operate to the advantage of the defendants in the foreclosure, and it is by no means to be presumed, in the absence of evidence, that appellants got a "cut rate" because their counsel also appeared for other parties. The sole question in fixing attorneys' fees should be the reasonable value of the services rendered in view of the labor performed by and required of counsel in the case.

The controlling question with the court apparently was that appellants did not succeed in obtaining a lien upon the interests of the Districts. As to that, we respectfully submit that counsel for appellants would have been derelict in their duties had they not made the Districts parties defendant and sought to impress the mortgage lien upon the entire irrigation system. The questions involved cannot be said to be so clear and simple that counsel should have

proceeded with the foreclosure only against the Crane Creek Company and the endorsers on the note. It may be inferred from the court's decision that appellants had a lien upon the Districts' interests in the system to the extent that the same had not been paid for, and in view of the complicated situation as to the time and manner of payment we know of no way that the facts as to such matters could have been ascertained or determined except by a suit to which the Districts would be parties.

We submit, therefore, that the trial court was not justified under the facts in this case in allowing mortgagees only $1,000.00 attorneys' fees for foreclosing a mortgage aggregating over $40,000.00. Furthermore, should our contentions be sustained as to the interests of the Districts being still subject to the lien of the mortgage, then, manifestly, under the opinion of the lower court appellants should be entitled to a further allowance, which should not be less than $2,500.00 including the $1,000.00 allowed. We submit that the allowance of $1,000.00 is unreasonable and without precedent.

In this connection we again call attention to the fact that the Districts claimed exemption from the mortgage as to their interests upon a ground entirely different from that upon which the court based the exemption. The contention of the Districts, as heretofore stated, was that the irrigation system was by virtue of the contract of August 22, 1910, dedicated to a public use, and that after such

contract had been entered into no mortgage, lien or encumbrance could be imposed upon such system. That contention was totally rejected by the court. Appellees did not claim release of the mortgage as to their interests because they had paid part of the purchase price, or upon the theory of the Court's decision.

Cross-appeal of Sunnyside Irrigation District and Crane Creek Irrigation District.

The two Irrigation Districts have taken a cross-appeal from that portion of the decree giving appellants a lien upon the interest in the system retained by the Crane Creek Company. Manifestly the Districts do not have an appealable interest in that part of the decree, and the taking of the cross-appeal was clearly frivolous and the cross-appeal should be dismissed and the cross-appellants required to pay a reasonable penalty for consuming the time of court and counsel with matters relating to such cross-appeal, and for encumbering the records with the documents relative thereto. In any event the cross-appellants should be required to pay at least a part of the expense of printing the record on appeal.

WHEREFORE, appellants respectfully submit that the decree of the District Court should be modified to the extent of giving appellants a first and prior lien upon all of the irrigation system, water rights, and rights of way described or referred to in their said mortgage, and by increasing the allow-

ance of attorneys' fees from $1,000.00 to not less than $2,500.00, and for other appropriate relief.

Respectfully submitted,

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